

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

[REDACTED]

B6

FILE: [REDACTED]  
SRC 06 199 50144

Office: TEXAS SERVICE CENTER Date:

SEP 24 2008

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an insurance and financial services business. It seeks to employ the beneficiary permanently in the United States as a financial manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 6, 2006 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of April 26, 2001.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$20.55 per hour or \$42,744 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes counsel's brief. Other relevant evidence includes a copy of the petitioner's 2001 Form 1120-A, U.S. Corporation Short-Form Income Tax Return, and copies of the petitioner's 2002 through 2004 Forms 1120, U.S. Corporation Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 Form 1120-A reflects a taxable income before net operating loss deduction and special deductions or net income of \$3,653 and net current assets of \$4,786.

The petitioner's 2002 through 2004 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of -\$3,197, -\$6,680, and -\$7,133, respectively. The petitioner's 2002 through 2004 Forms 1120 also reflect net current assets of \$2,291, -\$2,057, and -\$615, respectively.

On appeal, counsel asserts:

As of the 2001 priority date, [the petitioner] had the ability to pay the prevailing wage as required by law. [The petitioner] had both (1) the present income to pay the wage and (2) the ability to generate surplus income to pay the wage. First, in the year 2001, [the petitioner] paid independent contractors approximately \$100,000 in lieu of in house personnel with which it could easily pay the proffered wage. Second, from 2001 to the present, [the petitioner] was in a position to generate upwards of \$100,000 additional income with which it could easily pay the proffered wage.

In 2001, [the petitioner] paid independent contractors approximately \$100,000. This amount is reflected in the 2001 tax return other deductions statement as insurance premiums. Independent contractors were used because [the petitioner] did not employ a financial manager. Allocating this money towards in house sales personnel is much more cost efficient because independent contractors demand a higher wage. [The petitioner] is, therefore, able to pay the far less costly prevailing wage to an in house financial manager upon approval of [the beneficiary's] application.

In addition, [the petitioner] profits are generated by the sales of its sales staff and subcontracting sales persons. As financial manager, [the beneficiary] was conservatively projected to generate upwards of \$100,000 in 2001 and each year thereafter. The prevailing wage, \$42,660.80, could have easily been paid out of this profit.

The tax returns provided by [the petitioner] confirm that [the petitioner] was making a profit in 2001 and continues to make a profit. Any additional income, therefore, would not be used to pay debt but would increase [the petitioner's] profit. The tax returns do not reflect the income that could have been generated by [the beneficiary] because [the petitioner] elected not to employ [the beneficiary] until his petition was approved.

In addition, the denial states that the petitioner employed the beneficiary for a period of time and to provide evidence of wage via W2's, etc. This documentation, however, is irrelevant because the petitioner is not required to pay the offered wage until after permanent residence

---

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

is granted. 8 C.F.R. § 656.10(c)(3), (4). The fact of a lower wage is not a basis to deny the application. *Matter of Maysa, Inc.*, 98-INA-259 (BALCA May 21, 1999).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on April 18, 2001, the beneficiary claims to have been employed by the petitioner from May 2000 to the present (April 18, 2001). However, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to corroborate the beneficiary's claim. Therefore, the petitioner has not established that it employed the beneficiary in the pertinent years, 2001 through 2004, and must show that it had sufficient funds to pay the entire proffered wage of \$42,744 from the priority date of April 26, 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by federal case law. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

In 2001 through 2004 the petitioner was organized as a “C” corporation. For a “C” corporation, CIS considers net income to be the figure shown on line 28 of the petitioner’s Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner’s Form 1120-A. The petitioner’s tax returns demonstrate that its net incomes in 2001 through 2004 were \$3,653, -\$3,197, -\$6,680, and -\$7,133, respectively. The petitioner could not have paid the proffered wage of \$42,744 from its net incomes in 2001 through 2004.

Nevertheless, the petitioner’s net income is not the only statistic that can be used to demonstrate a petitioner’s ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner’s assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>2</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation’s end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner’s net current assets in 2001 through 2004 were \$4,786, \$2,291, -\$2,057, and -\$615, respectively. The petitioner could not have paid the proffered wage of \$42,744 from its net current assets in 2001 through 2004.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage based on its payments to independent contractors in 2001, on its ability to generate additional income, and on its reasonable expectation of increased business. Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.D.C. 1988) and *Chang v. Thornburgh*, 719 F. Supp. 532 (D. Tex. 1989) in support of his assertions.

Counsel advised that the monies paid to independent contractors in 2001 could be used to pay the wages of the beneficiary. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the independent contractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If those employee(s) performed other kinds of work, then the beneficiary could not have replaced them. Furthermore, the AAO finds it highly unusual that the petitioner would list independent contractors under insurance premiums. The petitioner has not submitted any evidence that it employed independent contractors in 2001 (Forms 1099-MISC,

---

<sup>2</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

payroll records, etc.). *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

\* \* \*

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

On appeal, counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) which held that CIS should consider the pledges of parishioners in determining a church's ability to pay. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Counsel also cites *Chang v. Thornburgh*, 719 F. Supp. 532 (D. Tex. 1989) is his assertion that CIS must consider the employer's ability to generate additional income when determining the employer's ability to pay the proffered salary. However, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Additionally, the petitioner has not provided any evidence of how it might generate additional income. Merely stating that "as financial manager, [the beneficiary] was conservatively projected to generate upwards of \$100,000 in 2001 and each year thereafter" is not evidence that the beneficiary could or did generate additional income. In fact, while the petitioner's gross receipts increased by \$90,000 from 2001 to 2002, its net income showed a loss from \$3,653 to -\$3,197 for those same years. Additionally, the petitioner's net current assets also decreased from \$4,786 to \$2,291 (more than 50%). Furthermore, the petitioner's gross receipts in 2003 increased by a mere \$8,436, its net income saw a loss of -\$6,680, and its net current assets saw a loss of -\$2,057. In 2004, the petitioner's gross receipts decreased by \$38,199, its net income saw a loss of -\$7,133, and its net current assets saw a loss of -\$615. The record of proceeding contains no evidence that the petitioner or the beneficiary could have generated more income for the petitioner subsequent to the priority date of April 26, 2001. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel is correct in stating that the petitioner is not obligated to pay the proffered wage until the beneficiary obtains permanent residence. However, the petitioner is obligated to show that it had sufficient funds to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g). Therefore, the submission of any Forms W-2 or Forms 1099-MISC issued by the

petitioner on behalf of the beneficiary would have been considered positively when determining the petitioner's ability to pay the proffered wage whether the beneficiary was actually paid the proffered wage or not.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 2000. The petitioner has provided tax returns for the years 2001 through 2004. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of \$42,744. In addition, the petitioner has not provided enough evidence to establish that the business has met all of its obligations in the past or to establish its reputation throughout the industry. The petitioner has also not shown that the years 2001 through 2004 were uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel on appeal do not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.